

A KENWOOD ELECTRONICS (M) SDN BHD & ANOR

v.

PROFILE SPEC (M) SDN BHD & ORS (NO 2)

B HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: D4-22-2270-1998]
30 JANUARY 2007

C **CIVIL PROCEDURE:** *Injunction - Damages - Undertaking as to damages - Suit dismissed by court - Enforcement of undertaking at end of trial - Allegation that court already functus officio - Whether without merit - Whether damages to be assessed*

D In 1998 the plaintiffs commenced a suit against the defendants and, pending hearing thereof, obtained *ex parte* injunction orders against the defendants restraining the defendants from distributing and selling Kenwood audio-video equipment in Malaysia. It was not in dispute that the injunction orders were granted *inter alia* upon the plaintiffs' undertaking as to damages in the event that they fail to obtain judgment thereof. On 14 June 2005, the court dismissed the plaintiffs' suit. Thereupon, on 28 July 2005, the defendants sought to enforce the undertaking as to damages, and so applied for an order that the Senior Assistant Registrar conduct an enquiry to assess damages. The plaintiffs objected, arguing that the court, having discharged all its duties, had become *functus officio*. It was further argued that the application was vitiated by *res judicata*, since the matter of the undertaking-cum-damages was taken up by the defendants but no order was made thereon by the trial court in its judgment of 14 June 2005.

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Held (ordering damages to be assessed):

H (1) The fact that the court made no specific order for assessment of damages after submissions were made does not absolve the plaintiffs from honouring the undertakings they had given for the injunctions. (para 9)

I (2) The injunctions were granted separately from the trial, in interlocutory proceedings for that specific purpose. The nature of the injunctions was such that the plaintiffs intend that the defendants' business and reputation would be adversely

affected. And the facts showed that the plaintiffs had enjoyed the benefit thereof for many years since the suit was commenced in 1998. (paras 9 & 12)

(3) The trial of the action does not determine whether the undertaking is to be honoured, but to determine the merits of the plaintiff's action. The court in this case did not order that the undertaking need not be honoured, but merely remained silent on the occasion of giving judgment upon the merits of the action. Since no order was made, the court had not become *functus officio* on the subject of damages arising from the interlocutory injunctions. The principle of *res judicata* is also of no application in these circumstances. (para 9)

(4) There has been no delay with regard to the defendants' application herein. Accordingly, their application is allowed with costs. (para 13)

Case(s) referred to:

Fazarudin Ibrahim v. Parkson Corp Sdn Bhd (No 2) [2000] 7 CLJ 422 HC (refd)

Other source(s) referred to:

The Supreme Court Practice 1988, vol 1, Part 1, para 29/1/15, p 478

*For the plaintiffs - A Kanesalingam (K Shanmuga with him);
M/s Kanesalingam & Co*

For the defendants - Anita Stephen; M/s Philip Choong & Co

Reported by WA Sharif

JUDGMENT

Abdul Wahab Patail J:

[1] On 20 July 1998, the plaintiffs obtained an *ex parte* injunction order against the 1st and 2nd defendants. The 1st and 2nd defendants were restrained from issuing "false" warranty certificates and selling Kenwood equipment without serial numbers issued by the 1st plaintiff until the hearing and disposal of the above action. The injunction order dated 20 July 1998 was extended pursuant to the order of the High Court dated 3 August 1998. On 12 March 1999, the plaintiffs obtained an injunction restraining the 1st and 2nd defendants from selling Kenwood audio-video equipment without Kenwood Warranty Certificates

- A unless the 1st and 2nd defendants expressly stated in writing to the purchasers that they were not the authorised dealers of Kenwood audio-video equipment and that the original serial numbers were not obliterated or removed.
- B [2] The said injunction orders granted to the plaintiffs were subject to the plaintiffs' undertaking to comply with any order made by the court or the judge relating to damages, which may be made by the court or judge after the trial of the action.
- C [3] On 14 June 2005, the learned judge dismissed the plaintiffs' action with costs.
- D [4] On that date, no pronouncement was made with regard to the issue of the undertaking as to damages given by the plaintiffs pursuant to the said injunction orders. The 1st and 2nd defendants' application herein is for the following orders:
- E (a) The said injunction orders be set aside forthwith;
- (b) An assessment of damages be conducted by the learned senior assistant registrar pursuant to the undertaking as to damages given by the plaintiffs in the said injunction orders; and
- (c) That the costs of this application be borne by the plaintiffs.
- F [5] The plaintiffs contended the defendants' application in encl. 93 is an abuse of process:
- G (a) That the said injunction orders lapsed upon the disposal of the trial;
- (b) That the undertaking pursuant to the injunction orders dated 20 July 1998, 3 August 1998, 7 November 1998 and 12 March 1999 obtained by the plaintiffs is not enforceable upon the conclusion of the trial.
- H [6] Issues of law
- I (a) Whether the court is now *functus officio* hear the application by the 1st and 2nd defendants in relation to the enforcement of the plaintiffs' undertaking as to damages pursuant to the injunction orders dated 20 July 1998, 3 August 1998, 7 November 1998 and 12 March 1999 obtained by the plaintiffs;

(b) Whether the defendants ought to be allowed to enforce the undertaking as to damages given by the plaintiffs in the injunction orders dated 20 July 1998, 3 August 1998, 7 November 1998, 12 March 1999. A

[7] The injunctions were sought and obtained by the plaintiffs on the basis of undertakings as to damages in the event the plaintiffs fail to obtain judgment. The submission for the plaintiffs that this issue has already been submitted on and decided by the learned trial judge is founded solely upon the argument that: B

(a) this was one of the issues formulated by the parties on the learned judge's direction as an issue for final submission; C

(b) the defendants dealt extensively with whether or not any order ought to be made on the plaintiffs' cross undertaking as to damages if the plaintiffs' claim was dismissed; D

(c) counsel for the defendants specifically asked for such an order;

(d) yet despite this no such order was made by the court for an inquiry as to damages on 14 June 2005 when judgment was pronounced in open court; and E

(e) even at the time judgment was pronounced on 14 June 2005 no application was made orally in open court for an inquiry as to damages. F

[8] It was submitted that this High Court is therefore *functus officio* having discharged all its duties in respect of this matter. It is also noted for the plaintiffs that the defendants have previously applied to set aside the injunction orders. This was dismissed by Yang Arif Datuk Yaakob J. The defendants' application for security for costs and for fortification of the cross undertaking as to damages was also dismissed by the learned judge in chambers, Yang Arif Datuk Malik Ishak J. G

[9] The plaintiffs' resistance to, and resulting in the dismissal of the defendants' applications to set aside the injunctions only serve to show the plaintiffs' desire for the injunction. The plaintiffs' resistance to and resulting in dismissal of the defendants' application for security for costs and for fortification of the undertaking for damages, serves to show plainly that the injunctions were founded only upon the plaintiffs' undertaking. The injunctions were granted separately from the trial, in interlocutory H I

- A proceedings for that specific purpose. The plaintiffs had enjoyed the benefit thereof for many years since the suit was commenced in 1998. The fact that the court made no specific order for assessment of damages after submissions were made does not absolve the plaintiffs from honouring the undertakings they have
- B given for the injunctions. The trial of the action was not to determine whether the undertaking is to be honoured, but to determine the merits of the plaintiffs' action. The court, in this case, did not order that the undertaking need not be honoured, but merely remained silent on the occasion of giving judgment
- C upon the merits of the action. Since no order was made, the court had not become *functus officio* on the subject of damages arising from the interlocutory injunctions. The principle of *res judicata* is of no application in these circumstances.
- D [10] In *Fazarudin bin Ibrahim v. Parkson Corp Sdn. Bhd.* (No. 2) [2000] 7 CLJ 422 (HC) it was held that was wrong to argue that the written judgment dated 23 October 1996 was all encompassing and covered encl. 38. Since the written judgment revolved entirely on encl. 10, and the application in encl. 38 was simply for an
- E order that damages be assessed in favour of the applicant and this was not decided in the written judgment dated 23 October 1996, the court was still free to consider encl. 38.
- F [11] *The Supreme Court Practice 1988*, vol. 1, Part 1, para. 29/1/15 at p. 478 on "Enforcing Undertaking" states:
- G An application to recover damages under an undertaking should be made promptly, and where the undertaking is dissolved at or before the trial should be then made; but this is not essential, and in a proper case damages may be awarded in a later application (*Ex p. Hailstone* [1910] 102 LT 877, dissenting from *dicta* in *Smith v. Day* [1882] 21 Ch. D 421); but a long delay is fatal except in special circumstances, see *Ex p. Hall* [1883] 23 Ch. L. 644".
- H [12] The nature of the injunctions upon the defendants, the various specific allegations made in support of the applications, and the resisting of the applications to set aside the injunctions are such that the plaintiffs intend that the defendants' business would be adversely affected, and its reputation along with it. Since the order granting the injunction is specifically based upon an
- I undertaking to abide by any order made as to damages in the event the plaintiffs' claim fails, no further order need to be made

at trial as to whether an assessment of damages is necessary. In the ordinary course, a party acting in good faith should be able to agree to reasonable damages, and no formal application or order from the court is necessary. An application or order need only be made to the court for assessment later where the parties are unable to come to an agreement. In such later application the particulars of damages are identified, and the parties are heard on their evidence and reasons why any disputed particular and its amount is or is not reasonable.

[13] There has been no delay with regard to the 1st and 2nd defendants' application herein. The order dismissing the plaintiffs' action against the 1st and 2nd defendants was made on 14 June 2005. The 1st and 2nd defendants' application herein was made on 28 July 2005. Accordingly, the 1st and 2nd defendants' application at encl. 93 herein is allowed with costs.

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